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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 86.

FEDERAL TRADE COMMISSION,
Petitioner,
vs.
THE CURTIS PUBLISHING COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

Statement of the Case.

This case comes before this Court upon a writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit, which Court set aside an order of the Federal Trade Commission made in a proceeding instituted by the Commission against the Curtis Publishing Company, the respondent. (Curtis Publishing Co. *v.* Federal Trade Commission, 270 Fed. 881.)

The proceeding was commenced on July 5th, 1917, by the issuing of a complaint by the Federal Trade Commission charging the respondent with violations of Section 3 of the Clayton Act and of Section 5 of the Federal Trade Commission Act (I, page 4).

Thereafter, on April 8th, 1918, the Commission issued

an amended complaint which, in its first count, charged the respondent with a violation of Section 5 of the Federal Trade Act, in the following language (italics ours):

> "Paragraph Two: That with the intent, purpose and effect of stifling and suppressing competition in interstate commerce in the publication, sale and circulation of *such periodicals*, the respondent now refuses, and for several months last past has refused, to sell its periodicals and publications to any dealer who will not agree with the respondent that he will not sell or distribute the periodicals and publications of certain of the competitors of the respondent, to other dealers or distributors.
>
> Paragraph Three: That with the intent, purpose and effect of stifling and suppressing competition in interstate commerce in the publication, sale and circulation of *weekly and monthly periodicals*, the respondent is making, and for several months last past has made contracts with numerous *wholesale distributors of periodicals*, wherein and whereby said distributors are required to agree to handle and distribute the *periodicals* of the respondent as agent of such respondent, and also are required to agree therein not to handle or distribute the *periodicals or magazines* of any other publisher without the permission of the respondent; that a large percentage of such wholesale distributors were formerly under a sales contract with respondent, the terms of which are practically similar to those incorporated in said contract of agency; that the wholesale distributors who have made such contracts with respondent are the principal and most efficient, and in many cases the only, medium for the *proper distribution of weekly and monthly periodicals* in the various localities throughout the United States" (I, pages 60-61).

In its second count the amended complaint charged the respondent with a violation of Section 3 of the Clayton Act, in the following language:

> "Paragraph Two: That the respondent, the Curtis Publishing Company, for several months last

past, in the course of interstate commerce, has sold and made contracts for sale, and is now selling and making contracts for sale, of large supplies of its publications and periodicals for use and resale within the United States and the Territories thereof and the District of Columbia, and has fixed, and is now fixing, the price charged therefor on the condition, agreement or understanding that the purchasers thereof shall not use or deal in the publications or periodicals of a competitor or competitors of respondent, and that the effect of such sales and contracts for sale, or such conditions, agreements or understandings, may be and is to substantially lessen competition and to tend to create a monopoly" (I, pages 61-62).

The respondent, on May 10th, 1918, filed its answer to the amended complaint denying its charges and setting up the facts relating to its distributing organization, consisting of numerous district agents and boy distributors, and the reasons for and the character of its contracts with such agents, which are the contracts referred to in the amended complaint (I, pages 63-67).

The taking of the testimony extended over a period of about seven months, during which time over 3,000 printed pages of testimony were taken.

The Commission thereafter made its report containing certain findings of fact and conclusions, and at the same time made and issued an order therein requiring the respondent to cease and desist from continuing to use or enforce its contracts with a large group of its agents (I, pages 90-95).

At that time the practice of the Commission did not provide for the filing of exceptions or objections to the Commission's findings or conclusions preliminary to the making of its order. This practice has since been changed (See XII, Rules of Practice before the Commission).

The respondent thereupon applied to the Circuit Court of Appeals for the Third Circuit, by petition, for

a review of the Commission's order, and, after a full hearing, that Court set the order aside. The Commission then applied to this Court for a writ of *certiorari,* which was granted.

The record on this appeal consists of volumes I, II, III and IV, containing the pleadings and testimony, and an exhibit book, and a separate unnumbered volume containing the petition of the respondent to the Circuit Court of Appeals for a review of the Commission's order, the opinion of that Court and its formal decree setting aside the order. A supplemental opinion of the Circuit Court of Appeals is printed at pages 3446-3447 of Volume IV of the record.

Throughout this brief we refer to the separate unnumbered volume as volume R.

Statement of Facts.

The Curtis Publishing Company was founded in 1883, and in the beginning published only the Ladies' Home Journal, a monthly publication. The Journal was at first circulated by mail and through the American News Company, the sole distributing agency for magazines and periodicals at that time. The respondent acquired the Saturday Evening Post, a weekly publication, in 1897, and it also was circulated in the beginning by mail and through the American News Company (II, pages 1318-1319).

The Saturday Evening Post was at that time little known and to bring it more generally before the public the respondent in 1899 conceived the plan of enlisting schoolboys throughout the country as salesmen. The basis of the plan was the belief that boys of that class could, without any interference with their school work, be effectively interested in obtaining regular customers for the periodical by personal solicitation and in delivering it to their customers. This plan was inaugurated in

December, 1899. It proved from the beginning a great success and the circulation of the Post increased rapidly (II, page 1323). At the outset the boys were in direct relation with the respondent, as they sent their orders direct to the home office in Philadelphia and obtained from it the copies of the publication for delivery to their customers (II, page 1320). This boy organization was composed almost exclusively of schoolboys and they sold only the Evening Post (II, page 1325). To train them in obtaining customers and salesmanship the respondent at an early date began printing and issuing pamphlets and leaflets containing suggestions for their guidance and has continued to do so to the present time (II, page 1325; Ex. Book, pages 51 to 109). Through correspondence and in other ways the respondent enlisted the co-operation of the parents and teachers of the boys in the work they were doing (II, page 1359). During the early period of the operations of this boy organization, though the boys were supplied directly from the home office with the publication for delivery to their customers, its distribution to retail dealers for sale to the public generally continued through the American News Company.

From the beginning the respondent, to stimulate the interest and co-operation of the boys, offered prizes and cash bonuses to them for exceptional work done, and has done so ever since (II, pages 1321-1351).

The boy organization has continuously developed from the time of its inauguration down to the present time both in its numbers and its methods. One of the later developments is the League of Curtis Salesmen, composed of the boys who have reached a certain standing both in their school work and in their general efficiency as salesmen. There are various grades in the League, membership in which is dependent on varying degrees of attainment. The boys who reach the highest grade are assured by the respondent of a good salaried position upon leaving school (II, page 1385; IV, pages 3225-3247).

At the time of the hearing there were two thousand applications for these boys from business concerns of high standing on file with the respondent (II, page 1385). The respondent pays the membership fees in the Young Men's Christian Association of all boys who are members of its League and who qualify according to certain requirements, and during the two years prior to the hearing herein such payments amounted to $4,903 (II, pages 1365; 1385). The names of the boys constituting the organization are reported regularly to the respondent by its district agents hereinafter mentioned with the number of publications sold by each boy (II, pages 1359, 1568; Respdt.'s Exs. 13 and 13-*a;* Ex. Book, pages 237-241). At the time of the hearing herein there were 35,000 boys in the organization (II, page 1359).

Attention is called to the fact, in view of what is said about the use of boys in the brief for the petitioner, that this Curtis boy organization is entirely different from the ordinary newsboys selling newspapers on the street or making deliveries for retail dealers. We do not claim that boys were not used for the latter purpose before the time that the Curtis boy organization was formed. The special and exceptional features of the Curtis boy service are that it is almost exclusively formed of boys who are attending school; that they are members of a well known organization; that they are taught and trained to be salesmen; that special ability and efforts are rewarded by prizes and promotion; that an interest is taken in the welfare of the boys after they have left school; and that there is co-operation between the respondent and its agents with the parents and teachers of the boys in the interest of the boys. This relation of the boys to the respondent in its entirety inspires loyalty on their part to the respondent and their exclusive devotion to its publications, and that loyalty is their only tie to the respondent. In these respects the boy organization is unique and distinctly an original conception and scheme of the respondent.

THE RESPONDENT'S DISTRICT AGENTS.

Owing to the increase in its boy organization the respondent found it more and more difficult to keep in touch with the boys from the home office, and in 1901 it commenced to appoint district supervisors or agents in various parts of the country to supply the Evening Post to the boys and to supervise the activities and work of the boys within their jurisdiction. Its first "district agent" for this purpose was appointed at Richmond, Virginia, in 1901 (II, page 1328). *At that time there were no wholesale distributors of magazines or periodicals in existence as all magazines or periodicals were distributed throughout the country by or through the American News Company* (II, page 1341). In appointing its district agents throughout the country, the respondent selected in every instance possible one of its former boy distributors and started him in the business; and when that was not feasible it appointed small retail dealers, such as newsdealers, book dealers, stationers, druggists, tobacconists, confectioners, photographers, sporting goods stores, telegraphers, and also teachers and church and Y. M. C. A. workers (II, pages 1331, 1332, 1345-1346). Among those appointed from time to time were also some dealers who were wholesaling a newspaper or newspapers, and in a few instances who were wholesaling one or more magazines and periodicals. It is to be borne in mind that any retail newsdealer who wholesaled one or more newspapers or one or more magazines and periodicals falls within the designation of a wholesaler of newspapers or periodicals and magazines, as the case might be, in the findings and order of the Commission and in the brief for the petitioner, however limited the wholesale element of his business was. In making the appointments there never was a system of selecting wholesalers of newspapers or of periodicals and magazines, the great bulk of the appointees having been either old Curtis

boys or retail dealers and individuals of the kind above mentioned (*ante*, page 7).

These district agents first distributed the Evening Post to the respondent's boys only for the supply of their customers, the retail dealers throughout the country being supplied with it and the Ladies Home Journal through the American News Company (II, page 1341). Owing to friction that had arisen between the respondent and the American News Company in 1909 (II, page 1343; IV, pages 3217-3218), the respondent decided to distribute both the Evening Post and the Ladies Home Journal through its district agents to the retail dealers as well as to the boy distributors, discontinuing its relations with the American News Company as a distributing agency (II, page 1345). At that time the respondent had about 1,700 district agents, about 85% of whom had formerly been its boys or small retail dealers and individuals such as have been described (II, pages 1345-1346). The total cost of maintaining this distributing organization was $262,272.28 for the year 1908 and $376,677.42 for the year 1909 (II, pages 1393, 1490-1492).

In 1912 the Country Gentleman, a weekly publication, was acquired by the respondent and was also distributed through its district agents and boys in the same manner as its other publications.

In 1910 when the change was made extending the function of the district agents to the supply of the retail dealers as well as the boys, the district agents wholesaled no magazines or periodicals except the respondent's, and they were in no sense general magazine or periodical wholesalers.

The number of the respondent's district agents in the United States at the time of the commencement of this proceeding was 1,375 (see Table, page 16).

The respondent also maintains a force of 75 supervising traveling representatives (II, page 1348), and five branch offices in the United States—at Boston, New

York, Chicago, San Francisco and Philadelphia—in charge of managers with a staff of assistants, whose sole duties are to attend to the supervision of the respondent's organization of district agents and boys (II, page 1368).

A district agent, upon his appointment, is personally visited by one of these traveling representatives who explains to him his duties and requirements as agent. Printed instructions are given to him, and he is specifically instructed regarding his duties with respect to the boy organization, in keeping correct accounts, and in making proper reports (IV, pages 3213, 3214). The respondent also publishes and issues to its district agents for their instruction, various monthly publications (II, pages 1387, 1388; II, page 1355 and pages 1-33 of Exhibit Book); and for the same purpose holds conventions of the agents from time to time at considerable expense (II, pages 1363, 1453).

The duties of the district agents include, in co-operation with the respondent, the maintaining of the boy organization, the coaching and training of the boys and teaching them how to sell; the ordering of the copies for distribution; supplying the boys and the retail dealers with such copies; and making complete weekly and monthly reports showing in detail the names of the boys and the names of the retail dealers to whom copies are distributed and the specific number sold by each (II, pages 1330, 1349, 1351; Respondent's Exs. 13 and 13-*a*, pages 237, 241 of Exhibit Book). They also see the parents of the boys to get their co-operation; they keep in touch with school teachers in their localities to inform themselves of the standing of the boys in school; co-operate with the respondent in arranging meetings of the boys and contests between them for prizes; and do many other things which a mere wholesaler of magazines would not be called upon or be willing to do (II, pages 1349-1351). Upon the appointment of a district agent all the boys in

the respondent's organization in the district become a part of his organization (II, page 1330).

This distributing organization has cost and is costing the respondent large sums of money annually. The cost for the years 1914 to 1917, inclusive (the expenses for the years 1908 and 1909 having been previously set forth herein), are as follows:

For the year			1914.....	$1,205,701.15
"	"	"	1915.....	1,335,656.02
"	"	"	1916.....	1,501,548.44
"	"	"	1917.....	1,498,188.71

(II, page 1396.)

It paid out between 1913 and the time of the commencement of this proceeding in 1917, for prizes and other cash bonuses to its boys, the sum of $625,686.61 (II, pages 1365-1368).

This method of distribution comprises the joint activities and close co-operation of the respondent, its district agents and boy distributors, for the proper distribution of its publications under the plan it originated and built up. As stated by the Court below:

> "The proofs show that the Curtis Company expended in the maintenance of district agents and boys in the four years, 1914 to 1917, both inclusive, over five and a half million dollars, and they abundantly satisfy us that this method of distribution is an entity made up of the joint activity and personal cooperation of district distributing agents and boy distributors and their relationship to the Curtis Company, each one of the three being dependent upon the other two for the proper cooperating and interrelated distribution of the respondent's publications and promptly furnishing the same to the reading public, and that this plan originated with, and was built up by, the Curtis Company through years of patient effort and at great expense, and that it forms the basic, practical method of distributing and marketing the Curtis Company's

publications and is a business asset of great value, and that the vital and basic element in this business is the undivided loyalty and personal interest and influence of the distributing agents."

(R, page 47.)

THE RESPONDENT'S CONTRACT WITH ITS DISTRICT AGENTS AND ITS RESTRICTIVE CLAUSE.

Prior to the year 1911 the respondent's contracts with its agents did not prevent them from wholesaling other periodicals and magazines. In that year the respondent put into its contracts a clause similar to the clause complained of in this proceeding (II, page 1396). That clause in the present contract is as follows:

"3. The District Agent agrees that he will at his own expense provide a suitable place and appliances for the sale and distribution of the said publications; that he will use all reasonable efforts and devote the necessary time for promoting the sale of said publications and supplying the demand therefor; that without the written consent of the Publisher he will not display, deliver or sell any copies of any one of said publications before the authorized publication date as specified in the printed requisition blanks, or dispose of any copies of said publications in the territory of any other District Agent or Special Agent of the Publisher, or act as agent for or supply at wholesale rates any periodicals other than those published by the Publisher, or directly or indirectly furnish to any other publisher or agent the names and addresses of the persons to whom the Publisher's publications are sold or delivered, or allow any one to stamp, paste or otherwise place on or in any of the publisher's publications or any part thereof any advertising matter, except that he may stamp his name as agent thereon and may insert circulars intended solely to increase the single-copy sale of the said publications" (II, pages 1296-1297).

Since 1911 the business has been conducted under such contracts.

The reason for the insertion of the restrictive provision was clearly stated by M. E. Douglas, as follows:

> "Q. What were the facts that led up to the Curtis Publishing Company putting that clause (the restrictive clause) in its contract?
>
> A. We found that other magazines and firms were seeking to use our boys and agents and were obtaining names and lists thereof" (I, page 1397).

Since the adoption of the restrictive clause the policy of the respondent with reference to its enforcement has been dictated, first, by the extent to which the publisher seeking to use one of the respondent's district agents desired to use his services; and, second, by the extent and circumstance of the business carried on by the district agent in question. No question as to the competitive character of the publication for which permission was sought affected the determination of the respondent.

Where any publisher in good faith sought the permission of the respondent to have one of its district agents wholesale a publication to retailers only, and made no attempt or effort to have that district agent utilize his Curtis boy force, and where that agent could take on an additional publication without detriment to his efficiency in handling the Curtis publications, the respondent has granted permission to the district agent to wholesale such additional publication to the retail dealers only. At different times in the past various publishers have endeavored openly or by subterfuge to reach the Curtis boy organization through the district agents. When this has happened the district agents have at once been notified by the respondent that the magazines and periodicals of the publisher in question could not be handled at wholesale by them and that the restrictive clause in the contract would be strictly enforced. This disposition of the respondent is clearly shown by a review of the history of the relationship of the respondent

to the publishers of the different publications which are referred to on page 15 of the petitioner's brief. These publications include those of the Butterick Publishing Company, which in 1912 instituted a raid upon the respondent's organization similar to that later carried on by the Pictorial and Crowell Companies. At that time, in response to this effort on behalf of the Butterick Company, formerly the Publishers News Company, the agents were specifically notified that they could not handle the publications of that company because of its attempted use of the entire Curtis organization (II, pages 1441-1444). The same reasons applied later in prohibiting access to the Curtis organization to the Pictorial and Crowell Publishing Companies. McCall's Magazine, Collier's Weekly and the Literary Digest are also mentioned in the petitioner's brief in this connection. (Brief, page 15.) We have been unable to find any evidence in the record that the respondent's agents have been prohibited from handling McCall's Magazine, the only reference to that magazine being that it was distributed through the American News Company and that its circulation was 1,310,660, figures identical with those set forth on page 16 of petitioner's brief (III, page 1894). Permission has been continuously given by respondent to its district agents to wholesale Collier's Weekly and the Literary Digest to the retail dealers (I, page 431; IV, page 2937).

Respondent's policy in this matter is clearly shown by Commission's Exhibits 27 (I, page 435) and 227 (IV, page 3322).

It is clear from the record as a whole that the policy of the respondent was dictated by the actions and conduct of the publisher, not by the competitive or non-competitive character of his publication. This is clearly shown by the fact that the district agents had in many instances been allowed by the respondent to handle the Pictorial Review and the Crowell publications up to the time it

came to the respondent's knowledge that those companies through subterfuge and by tampering with the respondent's district agents were endeavoring to obtain access to its boy organization (II, pages 1470, 1471; Ex. 161, page 1186).

The finding of the Commission that "many of said 447 dealers, and many others who have become such wholesalers since entering into such contracts, bound by said contract provisions as aforesaid, have requested respondent's permission to engage also in the sale or distribution of certain publications competing in the course of said commerce, with those of the respondent, which permission to said competing publications has been uniformly denied by respondent", must be read in the light of the facts and circumstances above set forth, disclosed by the uncontradicted testimony, showing the policy and practice of the respondent with respect to the enforcing of the restrictive clause in its contracts (II, pages 1472-1475).

The evidence disclosed that the only competitors of the respondent who have been uniformly refused permission to deal with the district agents have been three publishers who have endeavored to obtain the use of the boy organization acting through the district agents. These were the Publisher's New Company in 1912 and the Pictorial and Crowell Companies in 1917, the latter two of which are the "certain competitors" referred to in the Commission's findings, there being no evidence that the Publisher's News Company made any request after 1912.

The District Agency Force and the Alleged Unfair Competition.

The amended complaint in this proceeding is confined to the sale and distribution of weekly and monthly periodicals and magazines, and does not refer to or include newspapers. The allegations are that the respondent is

engaged in the publication, sale and circulation of weekly and monthly periodicals; and that it has made contracts with numerous wholesale distributors of periodicals with the intent, purpose and effect of stifling and suppressing competition in the publication, sale and circulation of weekly and monthly periodicals (I, page 60, Par. Three).

The findings of the Commission set forth that the respondent has entered into contracts with certain persons, partnerships or corporations referred to as "dealers" to sell or distribute its magazines, whereby it is agreed that such dealers shall not "act as agent for or supply at wholesale rates any periodicals other than those published by the publisher" without the written consent of the publisher; that of such dealers 447 previous to entering into such contracts were "regularly engaged in the business of wholesale dealers *in newspapers or magazines,* or both, and as such are engaged in the sale or distribution of magazines or newspapers, or both, of other publishers"; and that "many of said 447 dealers, *and many others who have become such wholesale dealers since entering into such contracts,* bound by said contract provisions as aforesaid, have requested respondent's permission to engage also in the sale or distribution of certain publications competing in the course of said commerce, with those of respondent, which permission as to said competing publications has been uniformly denied by respondent" (R. page 31).

It is important to note that there is included in the number of 447 "dealers" an unstated and indefinite number of wholesale newspaper dealers who were not therefore when they entered into these contracts wholesale dealers in weekly and monthly periodicals and magazines, so that the finding fails to disclose the number of dealers who were wholesaling weekly and monthly periodicals and magazines when they made their contracts with the respondent, as it fails to disclose the num-

ber of dealers who, *after the making of their contracts*, asked the respondent's permission to wholesale other magazines and periodicals, which was refused.

Of the 1,375 district agents in the United States, the undisputed evidence shows that:

1,273 were wholesaling no magazines or periodicals at the time they became the respondent's agents.

102 were wholesaling other magazines or periodicals at the time they became the respondent's agents.

1,009 were wholesaling no magazines or periodicals other than the respondent's at the time of the hearing, leaving 366 who were wholesaling certain other magazines and periodicals with the consent of the respondent or who were wholesaling certain magazines or periodicals when they were appointed district agents.

It is also true, if material, that 447 of these district agents were also wholesaling newspapers at the time of the hearing, 365 of whom had been started in the business of wholesaling magazines and periodicals by the respondent (IV, page 3222).

The extent of the business of these 447 wholesalers of newspapers is not disclosed by the evidence. The Commission produced no evidence either as to their location or the volume of their business, or as to whether or not there were other wholesalers of magazines or periodicals in their localities.

(IV, pages 3221-3223.)

During the period from 1911 to 1917 the respondent granted permission to a number of its district agents to wholesale to retail dealers the periodicals of other publishers wherever such district agents had sufficient time and the facilities to do so, but upon the condition that no use should be made of the respondent's boy organization for the distribution and sale of the periodicals of such other publishers (II, pages 1472-1473).

The agents receiving this consent constitute part of the 366 shown in the table. The publishers of these other magazines and periodicals have respected the respondent's rights, and have made no effort to utilize the respondent's boys for the distribution of their magazines, or in any way to demoralize the respondent's district agency force.

The restrictive clause in the respondent's contracts does not extend to the retailing of magazines or periodicals. The district agents are free to and do sell at retail any periodicals and magazines they desire to handle.

The restrictive clause does not apply to or affect the wholesaling of newspapers.

THE RESPONDENT'S ATTITUDE TOWARDS ITS AGENTS WHO WERE WHOLESALING OTHER MAGAZINES AND PERIODICALS WHEN APPOINTED.

The undisputed evidence shows that only 102 of the respondent's agents were wholesaling magazines or periodicals at the time of their appointment. (See table, *ante*, page 16.) The Commission did not show to what extent they were so engaged; it could not have been to any considerable extent because all the publishers of magazines and periodicals, with the exception of a very few, distributed their publications through the American News Company (see *post*, pages 23, 24).

The respondent has never objected to or prevented any of such agents from continuing to wholesale the magazines or periodicals they previously handled (II, pages 14, 15).

It appears from various exhibits introduced in evidence by the Commission that the respondent has specifically excepted such magazines and periodicals in the application and enforcement of the restrictive clause in

its contracts. Two of these were circular letters to the district agents and read, in part, as follows:

> "The plans of another publisher and his agent (News Company) lead us to remind you of Clause 13 of your Curtis contract. The purpose and effect of that clause are as follows:
>
> With respect to periodicals *not previously wholesaled by you,* you definitely agreed to refrain from wholesaling to boys or dealers any periodicals not our own without first obtaining our approval. * * * This is a general letter to all of our District Agents. Please attach it to your Curtis contract for future reference" (italics ours).
>
> (Commission's Exhibit No. 1, I, pages 279-280.)

> "You definitely agree to obtain our approval before you make any *new arrangements* to wholesale to boys or dealers any non-Curtis periodical (magazine) * * *
>
> Of course, this does not apply to newspapers *nor to arrangements in effect before the date of your contract with us*" (italics ours).
>
> (Commission's Exhibit No. 2, I, page 281.)
>
> To the same effect is Commission's Exhibit No. 75, I, pages 784-785.

A letter from the respondent to its district agent at Fort Wayne, Ind., reads, in part, as follows:

> "Our inquiry concerning the Pictorial Review resulted from a suggestion to us to the effect that you had made a *new arrangement* for the wholesaling of that publication—an arrangement unlike any that you had in effect with it at the time of your contract with us. * * *
>
> *We of course will stand absolutely by any arrangement in effect before your contract with us was made*" (italics ours).
>
> (Commission's Exhibit No. 73, I, page 781.)

On this question M. E. Douglas, the respondent's general sales manager, testified as follows:

> "Q. With respect to District Agent Monroe there is some testimony that he had had the agency for the Pictorial Review and for the Crowell Publishing Company prior to the time that he became the District Agent for the Curtis Publishing Company? A. Yes. Q. Have you made any objection or refused any permission, or raised any question about District Agent Monroe continuing the handling of those other publications? A. We told him we wanted him to feel free to handle those publications. Q. What was the reason you took that position with him? A. Because the arrangement was in effect—the arrangement with the Pictorial Review was in effect before he became our agent; but we did not know it at the time. Q. Do you know of any instance where you have refused permission to a District Agent to continue handling the Pictorial Review where he had been handling the Pictorial Review prior to the time that he took hold of the Curtis agency? A. I know of no instance where objections have been made or refusal has been made by us to a man who has been previously dealing with the Pictorial Company" (II, page 1415).

THE ATTEMPT BY THE PICTORIAL REVIEW COMPANY AND THE CROWELL PUBLISHING COMPANY TO USE THE RESPONDENT'S DISTRIBUTING ORGANIZATION.

In the latter part of 1916 and early in 1917, the Pictorial Review Company, which publishes the Pictorial Review, a monthly magazine, and the Crowell Publishing Company, which publishes the Woman's Home Companion, the American Magazine, Farm and Fireside and Every Week, both of which publishing companies had previously, for many years, circulated and distributed their publications exclusively through the American News Company and by mail, began an active campaign to secure

the services of the respondent's organization of district agents and boy distributors. They definitely sought out the respondent's agents in localities where there were other well established magazine wholesalers, having the service of their Curtis boy organizations definitely in view; they sought directly to get the service of the Curtis boy organizations of various agents; they endeavored to induce the respondent's agents to wholesale their magazines by the use of misrepresentations, and by offering inducements and agreements to indemnify them against any claims by the respondent for breach of their contracts; and in cases where certain agents declined to handle their publications without the respondent's approval they endeavored to persuade them to handle them through subterfuge, such as by having a relative or employee of the agent nominally wholesale their magazines; the details of some of which activities are set forth as illustrations in the opinion of the court below (R, pages 49-59). Further objectionable methods which came to the knowledge of the respondent are set forth in the testimony (II, pages 1551-1552; 1560-1561; 1413).

Prior to that time the respondent had granted permission to some of its district agents, on their request, to wholesale the Pictorial Review and the Crowell publications to retail dealers, being unaware when the permission was granted that these publishers were seeking to get hold of and use its boy organization wherever possible, or that they would use objectionable or demoralizing methods in dealing with its district agents (II, pages 1470-1471, and Com's. Ex. 161, II, page 1186).

In the latter part of February, 1917, these objectionable and demoralizing methods and practices having come to the knowledge of the respondent it thereupon refused permission in all cases to its district agents to wholesale the publications of these two publishers, they being the

only publishers who had, since 1912, resorted to such methods and practices (II, page 1554).

Of the respondent's district agency force of 1,525 agents in the United States and Canada, less than 200 signified any desire to wholesale the Pictorial Review (II, pages 1474-1475).

This refusal did not extend to any district agent who had wholesaled the Pictorial Review before his appointment as such (see *ante,* page 18).

When the respondent so refused to consent that its district agents might engage in the wholesale distribution of the magazines or periodicals of the Pictorial Review Company and the Crowell Company, and these companies found that they could not induce the respondent's agents to break their contracts with the respondent, they obtained, without any apparent difficulty, other persons who were already wholesaling magazines or periodicals, or retailers who were willing and equipped to wholesale magazines or periodicals, to act as wholesalers for their publications throughout the entire country, through whom they have been able to freely circulate and distribute their publications, and through whom, as the testimony showed, the circulations of their magazines and periodicals have steadily increased (R, page 59; I, pages 185, 267; and *post,* pages 62-63).

The Suit Brought by the Pictorial Review Company against the Respondent.

Following this action of the respondent the Pictorial Review Company made a complaint to the Federal Trade Commission. While the matter was under consideration by the Commission, and before it had issued any complaint against the respondent, the Pictorial Review Company filed a bill in equity against the respondent in the

United States District Court for the Southern District of New York, charging that the respondent's contracts with its district agents were in violation of Section 3 of the Clayton Act and that the enforcement thereof constituted unfair competition in business, and asking for an injunction to restrain the respondent from continuing the use of, and from enforcing, the contracts. In that suit, on the application for an injunction, the case of both parties was fully presented to the court in affidavits, and the questions of the validity of the restrictive contract and of unfair competition were raised, considered and determined. The court denied the application for the injunction, and in doing so said, in part, as follows:

> "What complainant evidently desires is, not merely to sell to these wholesalers, which it can do already in cases where the wholesalers have a retail trade, and to the extent of that retail trade, but to avail itself of the organization of the Curtis boys, built up by the ingenuity, labor and capital of the defendant. The defendant in insisting upon maintaining the integrity of the system, is not, in my opinion, guilty of unfair trade. On the contrary, the complainant, in attempting to avail itself of this system, is engaging in unfair trade. That it cannot build up a system of its own, if it desires to do so and will go to the trouble and expense, I do not believe. It is attempting here to secure a preliminary injunction to prevent the defendant from contracting with the latter's district agents not to market the Pictorial Review through boys and dealers. To grant such an injunction would break up what I think is a perfectly legitimate system for the promotion of sales of the defendant's magazines, and would enable the complainant, without expense, to employ the organization built up and fostered by the defendant."

Pictorial Review Co. vs. *Curtis Publishing Co.*, 255 Fed. Rep. 208.

Notwithstanding this determination of the questions involved the Commission thereafter, acting upon the complaint of the Pictorial Review Company, issued its complaint herein.

In view of certain comments of Hand, *J.*, in his opinion in that case treating the provision of the contract respecting the supply of the periodicals of the respondent to the district agents as, in form, a sale, though holding that the contract in its entirety was in substance an agency contract, the respondent changed the form of its contract to its present form to make it more accurately conform to the relation that actually existed between it and its district agents, retaining the restrictive clause (II, pages 1309-11).

This new form of agency contract is the only one now in use (IV, page 3259). It was introduced in evidence by the Commission as the contract referred to in, and attacked by, the Commission's amended complaint (Commission's Exhibit No. 189, II, pages 1294-1303), and is hereinafter set forth (*post*, page 41).

THE RETAIL DEALERS IN MAGAZINES THROUGHOUT THE COUNTRY HAVE BEEN ADEQUATELY SUPPLIED AT ALL TIMES WITH ALL MAGAZINES AND PERIODICALS FOR SALE TO THE PUBLIC THROUGH THE AMERICAN NEWS COMPANY AND OTHER MAGAZINE WHOLESALERS APART FROM THE RESPONDENT'S DISTRICT AGENTS.

Magazines and periodicals are wholesaled and distributed to the retail dealers throughout the United States in two ways:

1. Through the service of the American News Company, which distributes to, and reaches, the retail dealers in all parts of the United States, and which is now wholesaling and distributing upwards of 400 magazines and

periodicals, (III, pages 1823, 1892), including such magazines and periodicals as the Metropolitan, McCall's, McClure's, Atlantic Monthly, Scribner's, Century, The Delineator, Everybody's Magazine, Harpers Magazine, Life, Vogue, Worlds' Work, Leslie's Weekly, Review of Reviews, and The Woman's Magazine.

(I, pages 261-263; III, pages 1891-1894.)

2. Through magazine wholesalers, who are not agents of the respondent, and through retail newsdealers, who are not agents of the respondent, who are easily obtained to wholesale magazines. Only five publishers, besides the respondent, wholesale and distribute their publications, numbering in the aggregate 12 magazines (I, page 260) solely in that manner, they being the publishers of the Hearst magazines, the Munsey magazines, Literary Digest, Collier's Weekly and Pictorial Review. The Crowell Publishing Company uses both this method and the American News Company (I, pages 104, 106). All other publishers use the American News Company for that purpose.

There are from 35,000 to 40,000 retail dealers in magazines and periodicals in the United States (II, page 1410; III, page 1841), and these retail dealers can be and are readily reached by all magazine and periodical publishers through the American News Company and other magazine wholesalers, who are not the respondent's agents.

The court below said on this point:

> "Moreover, it is clear that these companies (the Pictorial Review Company and the Crowell Company) as well as other publishers, already have full unrestricted circulation agencies. The proofs show that the American News Company still continues its general business of distributing the publications of all publishers who choose to use its service; * * * and that its service reaches every retailer of magazines in the United States" (R, page 69).

* * * * * *

"From this it will be seen that when the Curtis Company, by Clause 13, kept its distributing agents from 'wholesaling to * * * dealer * * * any periodical other than those published by the Curtis Company * * * without first obtaining the approval of the publishers' they did not prevent or hinder such retailer from getting the publications of these other publishers through the American News Company" (R, page 70).

So far as individual wholesale distributors generally are concerned, it appears that there are others besides the respondent's agents who are open and available to all magazine publishers and to the respondent's competitors. The Court below in its opinion stated, in referring to the attempts of the Pictorial and Crowell Companies to get the respondent's agents, as follows:

"The proofs show that in most localities where this attempt to get the distributing district agents of the Curtis Company to handle their publications was made, *there were other wholesale distributors already employed in distributing other magazines*, and through whom these two companies could have distributed their own" (R, page 59, italics ours).

Specific instances are also set forth in the opinion of the Court below, to support this statement (R, pages 49 to 57), showing that in the places cited where attempts were made to get the respondent's agents, there were other large magazine wholesalers whose services were open to the respondent's competitors.

This fact is further shown by the letters and testimony referred to *post*, pages 60-62.

No complaint was made in the proceeding before the Federal Trade Commission by any of the publishers of the four hundred magazines published in the United States, with the exception of the Pictorial and Crowell

Companies, that the respondent's contracts with its district agents had in any way affected the distribution or sale of their magazines to the retail dealers and the public or curtailed their circulations or injured them in any way.

That proceeding grew out of, and is founded upon, the attempt by the Pictorial Review Company and the Crowell Publishing Company to obtain, without any expense to them, the services and benefit of the unique and efficient distributing organization originated by the respondent twenty years ago and built up by it, at great labor and expense, for the exclusive distribution of its own publications. As will appear this attempt was made notwithstanding that those two companies had previously used other efficient channels of distribution through which they had built up large circulations for their magazines, and have had at all times adequate means of distributing their magazines to the retail dealers and the public without encroaching upon the respondent's exclusive distributing organization (*post*, pages 59-61).

ARGUMENT.

I.

It was not error for the court to base its decision on material facts established by the proofs, not covered by the findings of the Commission, in addition to those findings.

On an application to the Circuit Court of Appeals to enforce or set aside an order of the Federal Trade Commission the statute provides that the Commission shall certify and file "a transcript of the entire record in the proceeding, including all the testimony taken, and the report and order of the Commission", and that the court shall thereupon "have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree affirming, modifying or setting aside the order of the Commission" (Federal Trade Commission Act, § 5). The only provision at all limiting the court's power of review is that "the findings of the Commission as to facts, if supported by testimony, shall be conclusive". Otherwise there could be no more comprehensive grant of the power of review. The statute is explicit and free from any ambiguity.

The questions involved in the proceeding before the Commission are determined by its amended complaint (*Federal Trade Commission* v. *Gratz,* 253 U. S. 421). It charges (1) that the Commission has reason to believe that the respondent has been and is using unfair methods of competition in violation of section 5 of the Federal Trade Commission Act; that the respondent is engaged "in the publication, sale and circulation of weekly and monthly periodicals"; that with the intent, purpose and effect of stifling competition in the publication, sale and

circulation of such periodicals it has refused to sell its periodicals and publications to any dealer who will not agree with it that he will not sell or distribute the periodicals and publications of certain of the competitors of the respondent to other dealers or distributors; that with the like intent with respect to the publication, sale and circulation of weekly and monthly periodicals the respondent is making and has made contracts with numerous wholesale distributors of periodicals wherein and whereby said distributors are required to agree to handle and distribute the periodicals of the respondent as agent of such respondent and not to handle or distribute the periodicals or magazines of any other publisher without the permission of the respondent; that a large percentage of such wholesale distributors were formerly under a sales contract with the respondent similar in its terms, and that the wholesale distributors who have made such contracts "are the principal and most efficient, and in many cases the only, medium for the proper distribution of weekly and monthly periodicals in the various localities throughout the United States"; and (2) that the Commission has reason to believe that the respondent is violating the provisions of Section 3 of the Clayton Act, and that it has sold and made contracts for sale, and is selling and making contracts for sale of large supplies of its publications and periodicals for use and re-sale, and has fixed, and is now fixing, the price charged therefor on the condition, agreement or understanding that the purchasers thereof shall not use or deal in the publications or periodicals of a competitor or competitors of respondent, the effect of which "may be and is to substantially lessen competition and to tend to create a monopoly" (I, pages 59 to 62). Thus there are two issues, (1) the issue of unfair methods of competition through making the alleged restrictive contracts with *numerous wholesale distributors of periodicals,* and (2) the issue with respect to sales, and contracts

for the sale, of its publications and periodicals in violation of Section 3 of the Clayton Act. It was the determinations of the Commission with respect to those issues that were before the Circuit Court of Appeals for review. The issue of unfair methods of competition was one for the ultimate determination of the Court as a matter of law (*Federal Trade Commission* v. *Gratz*, 253 U. S. 421). The issue with respect to whether the contracts were contracts of sale within the meaning of Section 3 of the Clayton Act was obviously one of construction and interpretation to be ultimately determined as a matter of law by the court in the light of the surrounding circumstances; and if they were contracts of sale there was the further question of mixed law and fact whether their effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce" (Clayton Act, § 3). These were issues requiring in a peculiar degree a comprehensive examination of the evidence in the case and the ascertainment of the facts established in a definite and concrete form. The Court had before it four volumes of testimony and the report of the Commission. The findings of fact contained in the report were few in number, vague, indefinite and incomplete in character, and insufficient as a basis for a decision. They fill only about a page and a half of the record and excluding repetitions little more than half a page (I, pages 90-93). There are over 3,000 pages of testimony. The court's narrative of the material facts fills twenty-one pages of its opinion (R, pages 37-59). Respecting the issue of unfair methods of competition all that is found by the Commission is that the respondent in the course of its business of publishing, selling and distributing its weekly and monthly periodicals has entered into contracts with certain persons, partnerships or corporations, referred to as dealers, to sell or distribute its magazines containing the restrictive clause; that approximately 447 of these deal-

ers are and previous to entering into such contracts were regularly engaged in the business of wholesale dealers in newspapers *or* magazines *or* both of other publishers; that *many* of said 447 dealers and *many* others who have become such wholesale dealers since entering into such contracts have requested the respondent's permission to engage in the sale or distribution of certain competitive publications of others, which permission has been uniformly denied; and that in enforcing said contract provision as to those dealers and in denying them such permission respondent has prevented and now prevents certain of its competitors from utilizing established channels for the general distribution or sale of magazines *or* newspapers, *or* both, of sundry publishers; that such established channels are in *most* instances the principal and most efficient, and, in *numerous* cases, the only medium for the distribution of such publications in the various localities of the United States; and that such method of competition so employed by the respondent has proved and is unfair. How many of these 447 dealers were wholesale dealers in newspapers only is not found, and their inclusion is a departure from the complaint which is confined to contracts with wholesale distributors of periodicals (I, page 90, par. 2). There is no indication of how many of these dealers with whom such contracts were made were engaged, when the contracts were made, in the business of wholesale distributors of periodicals or magazines as distinguished from the quite different class of wholesalers of newspapers only. A retail newsdealer who wholesales one or two magazines or newspapers is within the designation of a wholesaler of magazines in the one case and of a wholesaler of newspapers in the other. What could be more vague and indefinite than the finding that many of these dealers and many others who had become such wholesale dealers—(that is wholesalers of newspapers or magazines or both)—since they entered into their contracts have been denied permission to sell

or distribute certain publications competing with those of respondent or that by such denial the respondent has prevented certain of its competitors from utilizing established channels for the general distribution or sale of magazines *or* newspapers *or* both, and that such established channels of newspaper distribution as well as of magazine and periodical distribution are in most instances the principal and in numerous cases the only medium for the distribution of such publications (that is magazines and periodicals) in various localities? What conclusions can be drawn from such words as "certain", "many" or "numerous" or such a phrase as "established channels" without any definition, on which to base a determination of an unfair method of competition? They are simply generalities affording no basis for a judicial determination of such an issue as unfair competition, or whether competition may be substantially lessened, or whether there is a tendency to monopoly; and included throughout is an indefinite number of wholesalers of newspapers only who are not included in the allegations of the complaint to which we have referred. The findings which deal with the nature of the respondent's restrictive contracts, (that is whether they are contracts of sale or contracts of agency), are simply a bald finding that they are contracts of sale, which is a matter of law, and a repetition of the findings in respects to the 447 dealers and others and the established channels of distribution to which we have referred, as bearing on the effect of the contracts on competition and monopoly.

The court could not determine the issues on such limited, vague and indefinite findings, and its only course, in the performance of the duty imposed upon it by the statute, was to resort to the testimony to ascertain the specific facts necessary to a determination of the issues. The court said on this point:

> "An examination of these findings of fact shows that no findings whatever have been made in refer-

ence to the greater part of the vast volume of testimony in this case, and it therefore becomes the duty of this Court with a view to giving effect to such testimony to here recite what the proofs disclose as to the operations of the defendant Company in those matters in which there has been no finding of fact by the Commission. And, indeed, in our opinion such an examination and the ascertainment of the facts of such prior business dealings of the respondent Company is absolutely essential to a full understanding and a just determination of this case. Accordingly to the facts deducible from such testimony the Court now addresses itself" (R, pages 36-37).

The court, fully recognizing the conclusive character of such findings as the Commission made, if supported by evidence, held, on a careful consideration of the matter, fully set forth in the opinion, that it had the power, and that it was its duty as well, under the statute to ascertain all the material facts in the case established by the evidence (R, pages 66, 67).

On that ruling we stand, as giving effect, and the only rational effect, to the provisions of the statute.

It is contended on behalf of the petitioner that the court was confined to the findings of the Commission; that it was beyond its power to examine the evidence and ascertain material facts disclosed by the evidence and necessary to a proper determination of the case; and that if the court deemed further findings necessary it was bound to return the case to the Commission for that purpose. In view of the nature of the issues and the clear mandate of the statute there is no basis for any such circuitous procedure. The issues were of such a character that the ascertainment of the material facts required no other than the ordinary judicial function in examining the facts in a case. There was nothing technical about them that called for special or expert experience. There was no reason of that kind for remanding the case to the Commission for that purpose. Even if the court might

have done so in the exercise of its discretion, there would have been no reason for its doing so in this case. That is quite apparent from the character of the additional facts set forth by the court in its opinion and based, as the court says, on uncontradicted evidence (R, pages 37-59).

The cases cited in support of the petitioner's contention arising under the Act to regulate commerce furnish no analogy (Brief, p. 24).

The principal case is *L. & N. Ry. Co.* v. *Behlmer,* 175 U. S. 648. It was brought to enforce an order of the Interstate Commerce Commission requiring the railroad company to desist from charging a greater rate between two points than was being charged for a longer distance. In determining whether the lower rate for the longer haul was justifiable the Commission excluded from its consideration the weight of certain factors of competition. This court held that the Commission erred in doing so, and then one of the questions that arose was whether this court should "as a matter of first impression weigh the evidence for the purpose of ascertaining whether it established such substantial and material competition as justified the carrier in concluding that dissimilarity of circumstance and condition was brought about" (p. 673). After showing the complicated and technical considerations that would have to be weighed the court held that the matter should in the first instance be passed upon by the Commission, saying:

> "If then we were to undertake the duty of weighing the evidence in this regard we would be called upon as a matter of original action to investigate all these serious considerations which were shut out from view by the Commission and were not weighed by the Circuit Court of Appeals because both the Commission and the Court erroneously construed the statute. But the law attributes *prima facie* effect to the findings of fact made by the Commission and that body from the nature of its organization and the duties imposed upon it by the statute is peculiarly competent to pass upon the questions of fact of the character here arising."

Taking that case and *Texas & Pac. Ry.* v. *Interstate Com. Com.*, 162 U. S. 197, 237-239, it is apparent that the procedure they establish is based on the peculiar nature of the issues that are presented by railroad rates, and the fact that it is most in accordance with the scheme of the Interstate Commerce Act that such issues should be considered and determined in the first instance by the Commission, with its special expert experience. There is no analogy between such issues as to rates and the issues in the present case suggesting a similar procedure, and moreover there is no provision in the Interstate Commerce Act respecting the power of review which corresponds to the provision of the Federal Trade Commission Act governing that power.

II.

The additional facts determined by the Court as necessary to a decision of the case are not contrary to the findings made by the Commission, nor, in any particular, contrary to the evidence.

We will refer to the different quotations from the opinion criticized in Point II of petitioner's brief.

I. The Court said in its opinion (R, page 39):

> "These distributing agents, largely drawn from the ranks of the school boy salesmen, are, as we have said, the permanent keystones and the pivotal and controlling factor in the whole plan."

This statement is criticized at page 25 of the brief because of the fact that the Commission found that "approximately 447 are and previous to entering into such contracts with respondent were already engaged in the business of wholesale dealers in newspapers or magazines or both". The uncontradicted evidence in

the case fully supports the statement of the Court, which refers to the entire district agency force of the respondent. The respondent had 1,375 district agents in the United States. The number 447 referred to by the Petitioner in this connection appears in the evidence only as the number of the respondent's agents who were *at the time of the hearing* wholesaling newspapers (IV, page 3222). On page 27 of petitioner's brief, the number 447 is arrived at by adding the number of district agents who were engaged in wholesaling newspapers in both Canada and the United States before representing the Curtis Company, being 385, to the number of district agents who were engaged in wholesaling magazines in both Canada and the United States before representing the Curtis Company, being 72. Inasmuch as many of the respondent's agents who previously wholesaled magazines may be identical with those who previously wholesaled newspapers, the taking of the sum of those two classes is totally unwarranted in arriving at the number of agents who, previous to their appointment, wholesaled newspapers or magazines, or both. Furthermore, the figure 92 used in the calculation on page 27 is erroneous, it being obvious that 241 less 169 (the figures used by petitioner) leaves 72, not 92. The Petitioner's criticism is that these 447 agents "were not drawn from the ranks of the school boy salesmen". Because they were wholesaling newspapers at the time of the hearing is no indication that they were not Curtis boys at the time of their appointment. Therefore there is no basis for the criticism. No one can read the testimony without being impressed by the significance of the boy force in the system of distribution and that is all the court meant to express.

II. At page 26 of the brief the court's statement that the respondent's distributing organization was "sub-

stantially engaged in distributing and selling exclusively the Curtis Company's publications" is criticized as being contrary to the finding made by the Commission, hereinbefore referred to, as to the 447 so-called dealers. The Court's statement refers to the entire district agency force of 1,375 agents and the entire boy organization and has reference only to the wholesaling of magazines. In other words, the court did not have in mind the wholesaling of newspapers by district agents. The controversy in the case concerns the distribution of magazines and periodicals. The whole distributing force of the respondent existed primarily to sell its publications. Whatever selling or distributing they did of the magazines and publications of others was purely incidental to that main business. The operations of most of the agents were confined to the respondent's publications. The table in the Statement of Facts shows that out of a total force of 1,375 district agents in the United States 1,009 were wholesaling, at the time of the hearing, no magazines or periodicals other than the respondent's (*ante,* page 16). In view of the fact that 1,009 of the agents were wholesaling exclusively the respondent's magazines and periodicals, and that the other 366 were primarily engaged in the sale and distribution of the respondent's magazines and periodicals and only incidentally in the magazines and periodicals of others, the court below was justified in making this statement which is criticized.

III. The petitioner takes exception to this statement of the Court:

> "The proofs show that in most localities where this attempt to get the distributing district agents of the Curtis Company to handle their publications was made there were other wholesale distributors already employed in distributing other magazines and through whom these two companies could have distributed their own" (R, 59).

This quotation is taken from that part of the opinion wherein the Court was describing the attempts made by the Pictorial Company and the Crowell Company to gain the use and benefit of the entire Curtis organization. The proofs showed specifically that in the instances where these two companies sought to utilize a Curtis agent there were other available wholesalers to be had to whom these companies might have gone had it not been their intent and purpose to secure the benefits of the Curtis boy organization, many of which instances are set forth in the opinion of the court (R, pages 48-59). Read in that connection, the statement of the Court is absolutely correct and is not open to the charge that it is contrary to the finding of the Commission quoted upon page 29 of Petitioner's brief.

IV. The petitioner takes exception to the following quotations from the opinion on the ground that they are contrary to the weight of evidence:

(1) "The proof shows that 95% of these boys sell only the publications of the Curtis Company."

Authority for this statement will be found in Volume II, page 1493 of the record. It is obvious that it refers only to the boys who belong to the Curtis organization and has no application whatsoever to the ordinary newsboy selling papers or magazines on the street or making deliveries, who are referred to in several pages of the petitioner's brief.

(2) "After the success of this plan had been demonstrated by the work and money of the Curtis Company, it is to be noted as an evidence of business morality among the magazine publishers, that but two of the four hundred magazine's publishers made any effort to take away from the Curtis Company the undivided services of its district agents" (R. 47).

This statement is attacked on the ground that certain other publishers with the consent of the respondent had

used its district agents for distribution of their publications to the retail trade. That is a fact as we have stated *in this brief, and has no bearing on this statement of the court.*

The proof is clear that the Pictorial Company and the Crowell Company were the two publishers who were endeavoring "to take away from the Curtis Company the undivided services of its district agents". Their conduct in so doing was expressly referred to and criticized in its opinion (R. pages 48-59); where the court specifically outlines these attempts. The quotation referred to does not apply to those publishers who in a proper way obtained with the consent of the respondent the services of the respondent's district agents for the distribution of their publication to the retail dealers only.

(3) "But from 1912 to 1917 the services of the boys in the organization described had been utilized solely by the Curtis Company. During that time a number of other magazines and periodicals had been wholesaled to retail dealers by some 366 of respondent's district distributing agents out of a total of 1,375" (R. 48).

(4) "This general plan (of distributing through wholesale dealers to newsstands and to boys) seems to have been original with the Curtis Company, the proof being that at that time there was no other publisher of magazines who circulated its magazines through local district agents supplied directly by the publisher and by the boys" (R. 45).

Exception is taken to these statements on the ground that publishers of newspapers had established wholesale dealers in various localities for the sale of their newspapers prior to this time. This has no bearing upon the quotation objected to which referred to magazines only and their circulation through a special class of district agents and a special boy organization.

III.

The respondent's contract with its district agents is a contract of agency in form, operation and effect and not a sale or contract of sale within the meaning of Section 3 of the Clayton Act.

The contract between the respondent and its district agents when the Pictorial Review Company first made its informal complaint to the Federal Trade Commission is set forth at pages 193 to 202 of Volume I of the Record. Before any complaint was issued by the Commission the suit of the Pictorial Review Company against the respondent in the District Court of the Southern District of New York, to which we have referred (*ante*, page 21), had been begun and the motion for an injunction therein had been heard and decided. In the opinion rendered on that application on June 23rd, 1917, Hand, *J.*, construing the contract then in force, held that the district agents were purchasers of the respondent's publications supplied to them, but that though not merely factors or agents they were clearly much more than purchasers, and concluded his opinion with the following observation:

> "Looking behind the form of the contract which the defendant makes with its agents to the inherent features of the transaction, I think it may be said that the selling arrangement more nearly resembles an agency conducted by district agents in co-operation with the Curtis boys than it does an outright sale to the district agents and nothing more."
>
> (*Pictorial Review Co.* v. *Curtis Pub. Co.*, 255 Fed. pp. 208, 210.)

The respondent thereupon, to remove any ambiguity or obscurity on this point in the contract then in force and to have the contract conform to the true relations

of the district agents to the respondent, which was that of an agency pure and simple, substituted the present contract for the old one (II, pages 1309-1311). The new contract is known as "District Agency Agreement 'JDA8'" (Commission's Exhibit 189, II, pages 1294-1303). The Commission then amended its complaint and introduced the new contract in evidence as the contract referred to and covered by its amended complaint (II, page 1294). On this substitution the new contract became the only contract between the respondent and its district agents in force and use (IV, pages 3259-3260).

The Circuit Court of Appeals in its opinion inadvertently analyzed the old contract as the contract in force, although it had stated that the present contract was "the one now used and whose future use is the practical commercial factor involved". Upon discovering this inadvertence the Court rendered a supplemental opinion as follows:

> "BUFFINGTON, *J.*:
>
> Since the opinion in this case was filed our attention has been called to the fact that an analysis was made of the old agency contract of the Curtis Company (Exhibit A of the answer) instead of the present contract of the Curtis Company (Exhibit B of the amended answer, but erroneously referred to in the opinion as Exhibit D). Parts of the old agency contract were also printed in the margin of the opinion. It is only proper to state that in the voluminous record and exhibits a mistake was made in this respect. However, an analysis of the present contract of the Curtis Company has satisfied us that the reasoning of the opinion with respect to the old contract applies with even greater force to the present contract and that the present contract (Exhibit B of the amended answer) is in our opinion to be regarded and construed as a contract of agency and not as a contract of sale or lease. Our decision

in this case is therefore not affected, but the original opinion is supplemented and corrected in accordance herewith" (IV, pages 3446-3447).

The elaborate analysis of the old contract in the opinion of Buffington, *J.* (R, pages 62-64), resulted in the following conclusion:

> "It has therefore seemed to us that the unique character of the subject-matter of this contract, the object the publisher had in view, and the phraseology, conditions and obligations of this contract, unite to make the contract one of consignment to a distributing agent who was furthering the business of his principals, and not one of a buyer who thereby acquires title for his own individual purpose. Such being the case we hold the Commission erred in the legal construction of this contract and therefore had no proof before it to find as it did in its third finding that the 'respondent had made sales of its magazines to or entered into contracts for the sale of same with certain persons' etc., and that therefore its legal conclusion from such findings, viz., 'that the acts and conduct set forth in paragraph 3 of said finding are under the circumstances therein set forth in violation of the provisions of Section 3 of the Clayton Act', was in error, as was also the part of its decree which enforced such conclusion" (R, pages 64-65).

The terms and provisions of the present contract put this ruling, applying it to the present contract, beyond doubt.

For convenience we here insert the pertinent parts of the present contract (II, pages 1294-1304):

"DISTRICT AGENCY CONTRACT.

Form JDA 8.

AGREEMENT, dated between The Curtis Publishing Company (hereinafter called the Publisher), and
(hereinafter called the District Agent).

WITNESSETH: That the District Agent is hereby appointed agent for the sale of the following publi-

cations of the Publisher, viz., The Ladies' Home Journal, The Saturday Evening Post, and The Country Gentleman for the following territory, * * *

1. * * * the Publisher will supply and consign to the agent such stock of the above publications as the Publisher finds the District Agent requires from time to time, * * * The title of (to) said publications shall remain with the Publisher until they are sold by the District Agent. * * *

2. The District Agent will supply to boys and dealers copies of The Saturday Evening Post and of The Country Gentleman at the net wholesale rate of three cents (3¢.) a copy for sale at five cents (5¢.) a copy, and copies of The Ladies Home Journal at eleven cents (11¢.) a copy for sale at fifteen cents (15¢.) a copy, and will make deliveries of each of the said publications early on the morning of the authorized publication day thereof. * * * All sales must be for cash or at the risk of the District Agent.

3. The District Agent agrees that he will at his own expense provide a suitable place and appliances for the sale and the distribution of the said publications; that he will use all reasonable efforts and devote the necessary time for promoting the sale of said publications and supplying the demand therefor; that without the written consent of the publisher he will not display, deliver or sell any copies of any one of said publications before the authorized publication date as specified in the printed requisition blanks, or dispose of any copies of said publications in the territory of any other District Agent or Special Agent of the Publisher, or act as agent for or supply at wholesale rates any periodicals other than those published by the Publisher, or directly or indirectly furnish to any other publisher or agent the names and addresses of the persons to whom the Publisher's publications are sold or delivered, * * *

4. The District Agent shall, subject to the direction and the control of the Publisher, train, instruct and supervise such adequate force of boys within his district as has been or shall be organized by or

under the instructions of the Publisher for the purpose of distributing the said publications.

5. The Publisher will allow the District Agent as compensation the following commissions:

(*a*) On copies supplied to boys and dealers at the rates hereinbefore specified, a commission of one-half cent (½c.) on each copy of The Saturday Evening Post and one and one-quarter cents (1¼c.) on each copy of The Ladies' Home Journal, and on each copy of The Country Gentleman until June 29, 1918, one cent (1c.)—thereafter one-half cent (½c.).

(*b*) On sales made at retail, a commission of two and one-half cents (2½c.) on each copy of The Saturday Evening Post and five and one-quarter cents (5¼c.) on each copy of The Ladies' Home Journal and on each copy of The Country Gentleman until June 29, 1918, three cents (3c.)—thereafter, two and one-half cents (2½c.); provided that said commissions shall be deemed earned and payable only as to such copies as to which punctual and accurate reports are made by him in accordance with this agreement.

6. The District Agent will return to the Publisher the cover pages or headings of all unsold copies of said publications, as a voucher that said copies remain unsold, * * *

7. The District Agent agrees to mail his requisitions weekly and to send with each requisition except the first, and upon blanks furnished by the Publisher, a report itemizing by names and addresses of retailers both the number of copies of each publication in the consignments previously sold by the District Agent either directly at retail or to boys and dealers, and the number of copies unsold, together with a check or money order for the amount of such sales less his commissions, and for the amount due on any separate accounting for copies not reported as sold or returned but as to which no unsold copies, cover, pages or headings shall have been returned within the time limited in Paragraph 6 hereof. * * * And the District Agent agrees

to distribute prize vouchers to boys and dealers according to instructions from the Publisher, provided that prize vouchers shall not be redeemable by the District Agent nor by his relatives or salaried employees.

* * * * * *

9. The District Agent agrees that during the continuance of this agreement he will sell at least ..... copies of each issue of The Saturday Evening Post, at least ..... copies of each issue of The Ladies' Home Journal and at least ..... copies of each issue of The Country Gentleman.

10. This agreement shall not become binding on the Publisher until the Publisher has ratified it in writing at the home office in Philadelphia. It shall be for the term of ..... from the date of such ratification unless otherwise terminated under its provisions and shall continue thereafter from year to year unless otherwise so terminated. Unless either party gives to the other thirty days' notice prior to the termination of the ..... or any subsequent year, the agreement shall continue for another year, and so on from year to year.

11. In case of war, embargo, strike, fire, flood, earthquake, change in the postal rates or in the retail price of any one of the said publications or in case of breach by the District Agent of any of his obligations, or guarantees hereunder, the Publisher may terminate without notice. The Publisher may also terminate on thirty days' previous notice given to the District Agent.

12. The District Agent may terminate at any time by giving thirty days' notice by mail to the Publisher prior to such termination, provided he obtains a successor satisfactory to the Publisher and forwards the successor's acceptance of an agreement in form similar to this agreement, together with the successor's cash security, and provided further that the District Agent will give to such successor a written agreement not to deal at wholesale in any of the said three publications in said agency territory for a

period of thirty days from the date of ratification of such transfer of the agency.

13. In consideration of this agreement of employment the District Agent will deposit with the Publisher on or before the date of his first requisition hereunder, the sum of $..... On said sum, until the termination of the agency, the Publisher shall allow and pay the District Agent annual interest at the rate of five per cent. per annum. At the termination of the agency, if the District Agent shall have faithfully performed all the conditions and guarantees of this agreement, the Publisher will return to him said sum with all unpaid interest thereon. If the District Agent shall not have kept all the several conditions, stipulations and guarantees by him to be performed, this sum may be retained by the Publisher as liquidated damages, * * *."

Both the language of this contract and the surrounding circumstances stamp it as indubitably a contract of consignment and agency and not a contract of sale. The district agencies originated after the institution and early development of the boy organization. The plan of the boy organization was inaugurated in December, 1899. The first district agent was not appointed until 1901. With the expansion of the boy organization it became impracticable to manage and supply the boy force from the Home Office and the district agencies were created to meet that situation. Thus in its origin the function of the district agent was to supervise and manage the boy force in his territory and to supply the boys with the Evening Post for sale to their customers. The principal function of the district agent was the management and training of the boy force and he was merely a conduit as to the supply of the publication to them. It was not until some years afterwards, in 1909 and 1910, that he became the conduit through which the Evening Post and The Ladies' Home Journal were supplied to the retail news-dealers. Thus the dominating relation of the district agents to the re-

spondent from the beginning was one of agency, first for the management and supply of the boy force and later, in addition, the supply of the retail dealers, and it had none of the characteristics of a contract of purchase and sale. The contract grew out of that relation and it is a controlling circumstance in determining its nature, operation and effect. There was no occasion to resort to any device of language or subterfuge to conceal anything. The respondent needed district agents and it employed them. It was not the case of a manufacturer making an arrangement with dealers for the sale of his products to them.

The following provisions of the contract are particularly in point:

The designation of the contract is "District Agency Contract." Throughout the contract the party employed is designated as the "district agent". It opens with his appointment as "agent for the sale of the following publications," etc. The respondent is to "supply and consign to the agent such stock of the publications as the publisher finds the district agent requires from time to time," and the title to the publications is to remain in the respondent until they are sold by the agent. This last provision is a usual one in contracts with commission agents for the protection of the principal from any claim by the agent or third persons to the contrary. It was not inserted as a subterfuge. It is consistent with the contract as an entirety and the actual relation of the parties.

The district agent is to supply the boys and dealers with copies of the publications at the rates prescribed. He is to train, instruct and supervise, under the direction and control of the respondent, such adequate force of boys within his district as has been or shall be organized by or under the instructions of the respondent for the purpose of distributing the publications. He is paid as compensation commissions at the prescribed rates on copies

supplied to boys and dealers and on sales that he may himself make at retail. He is to return all unsold copies in the manner prescribed. He is to mail his requisitions weekly accompanied by a report of the copies of each publication previously sold either directly by the agent himself at retail, or to boys and dealers, and the number of copies unsold, and a money order for the amount of such sales less his commissions. He agrees to sell at least a prescribed number of copies of each issue of the publications. He is to deposit with the respondent at or before the date of his first requisition a prescribed sum of money on which the respondent is to allow and pay annual interest at the rate of 5% per annum. At the termination of the agency, if the agent has faithfully performed all the conditions and guarantees of the agreement, the deposit is to be returned to him with all unpaid interest, and if he shall not have faithfully performed such conditions and guarantees it may be retained by the respondent as liquidated damages.

To construe such a contract as a contract of sale, absolute or conditional, and not a contract of agency, is to ignore the real and actual relation of the parties and to violate the language of its terms and provisions and its purpose and intent. If the intention had been to enter into a contract of sale, thereby establishing the relation of vendor and vendee, it would have read very differently and been a much shorter document. This seems to us almost too obvious for further argument. It is at any rate unnecessary in view of the clear, forcible and penetrating discussion of the subject in the opinion of the Circuit Court of Appeals (R, pages 62-64).

In *Willcox & Gibbs Co.* v. *Ewing,* 141 U. S. 627, this Court said, at page 636:

> "There was some discussion at the bar as to whether Ewing was, strictly, an agent of the company. We think he was. He was none the less an agent because of his appointment as 'exclusive ven-

> dor' of the defendant's machines within a particular territory, or because of the peculiar privileges granted to or the peculiar restrictions imposed upon him. One clause of the contract prohibits him from soliciting trade, directly or indirectly, in the territory 'of other agents'; another, that he will bind 'all sub-vendors or agents' to sustain the established retail prices of the company; and still another imposes restrictions upon the sale of his 'appointment or agency'. The agreement constituted him the sole agent of the company for the sale of its machines within a certain territory. It is true that the machines he undertook to sell were to be purchased by him from the company at a large discount. But he could not sell them by retail below the regular retail prices. This arrangement was the mode adopted to protect the company's interests, and to secure the plaintiff such compensation for his services as would induce him to devote his time, attention and abilities to the company's interests. He was still a mere agent to sell such machines as might be delivered to him under the contract. * * * So far as the company's power of revocation is concerned, the case is not materially different from what it would be if the plaintiff had agreed to sell such machines as were delivered to him at the established retail prices, receiving, as compensation for his services, the difference between those prices and the amount he agreed to pay for them under the contract of 1874. In either case, his relation to the company would be one of agency, that could be terminated at its will or by renunciation upon his part, at least after 1875."

Thus in that case the relation was held to be one of agency though the agent purchased the goods he was to sell. In the case at bar it is contended that the contract is not one of agency though the goods are consigned to the agent for sale and distribution.

It is contended on behalf of the petitioner (Brief, pages 40-41) that the particular feature of the contract which stamps it as a contract of sale is found in clause

9, by which it is said the "dealer guarantees to sell a specified number of the respondent's magazines", taken in connection with clause 13 respecting the deposit the agent has to make. The argument seems to be that the only guarantee which the agent makes is to sell a specified number of the publications, and therefore if he fails his deposit is liable "for the price of those unsold" which is equivalent to payment up to the fixed minimum. Just what the point of the argument is we do not see. Clause 9 is no more a guarantee than the other agreements of the agent contained in the contract. It is an agreement in terms that during the continuance of the contract he will sell at least the fixed number of copies of each issue of the publications. That is a common provision in contracts with commission agents to assure diligence and activity on their part by establishing a certain standard of production and efficiency. The number of copies required to be sold is no doubt based on the experience of the district and the agent accepts it as a fair estimate of what can be accomplished. Without such a provision there would be no contract standard of performance. The deposit is not related specifically to clause 9 or any other clause. It is simply the amount agreed upon as liquidated damages if upon the termination of the contract the agent shall not have performed all the several conditions, stipulations and guarantees by him to be performed. We fail to see how the presence of those provisions in the contract tend to characterize it as a contract of sale rather than a contract of agency, because it is a common provision in contracts with commission agencies that there shall be a deposit or a bond or undertaking as a security against any default in performance. That is what this contract provides and nothing more.

The contention (Brief, pages 41, 42) that the change from the old to the new contract after the decision in

Pictorial Review Co. v. *Curtis Pub. Co.,* 255 Fed. 206, was a device by a mere change in the form of the contract to disguise its purpose and escape the prohibitions of the Clayton Act is quite unwarranted by the facts. The reason for, and purpose of, the change we have already stated, and it was not a device for any such purpose. Though Hand, *J.,* did hold in that case that the publications were sold to the district agents, he did not hold that it followed that the relation of the parties under the contract was that of vendor and vendee within the Clayton Act. That a sale of the goods would not affect the relation of the parties to such a contract as one of principal and agent is the ruling in *Willcox & Gibbs Co.* v. *Ewing, supra.* It has been our contention from the beginning that there was not a sale under the first contract and that was the view of the court below after a careful examination of that contract (R, pages 62-65). The new contract eliminated the ambiguity or obscurity in the old contract which led Hand, *J.,* to regard the publications as sold by the respondent to the district agents.

The case of *Standard Fashion Co.* v. *Magrane, Houston Co.,* decided by this Court on April 10th, 1922, is cited on the petitioner's brief as sustaining its contention, but it is clearly distinguishable. It involved a contract containing a restrictive clause applying to the sale of dress patterns which was in force with more than 20,000 retail dealers. Both the Circuit Court of Appeals and this Court held, in construing the contract, that it was a contract of sale within the meaning of the Clayton Act. The Circuit Court of Appeals said:

> "We also agree with the District Court that the contract does not establish an agency 'properly so termed', but that it is a contract for sale. The case is easily distinguishable in this regard from *Willcox & Gibbs Co.* v. *Ewing,* 141 U. S. 627. Full title passed from the plaintiff to the defendant.

The defendant was selling its own goods to its own customers; it was not, under delegated authority, selling plaintiff's goods to the plaintiff's customers."

Standard Fashion Co. v. *Magrane, Houston Co.*, 259 Fed. 793.

This Court, in affirming the decision below, said:

"It is insisted by the petitioner that the contract is not one of sale but is one of agency or joint venture, but an analysis of the contract shows that a sale was in fact intended and made. It is provided that patterns returned for exchange must have been purchased from the petitioner. Respondent agreed to purchase a certain number of patterns. Upon expiration of the notice of termination the respondent agreed to promptly return all Standard patterns bought under the contract. In the event of the disposition of the business property of the respondent at Washington Street and Temple Place, the respondent might deliver its stock of standard patterns to the petitioner for repurchase under the repurchase clause of the contract.

Full title and dominion passed to the buyer. While this contract is denominated one of agency it is perfectly apparent that it is one of sale."

The contract in that case is clearly and essentially different from the contract in the present case. It is one of sales to retail stores. It imposed no duty on the retail stores other than the keeping on hand for resale a certain amount of standard patterns, and the stores had nothing to do under the contract except to buy from the Fashion Company and resell to the public. There were none of the elements of agency involved in the present case and there is no real analogy between them.

In fact, every case of this kind turns on the particular contract which is involved, the situation out of which it springs, the exigency it is designed to meet and all the surrounding circumstances. We do not contend that in the case of a system of contracts a contract may not

on its face by ingenuities of language and devices of form for some evasive purpose appear to be the grant of a license or an agency or some other relation than that of vendor and vendee whilst in reality it is a contract of sale or one under which the ownership of the goods passes for a consideration paid (*Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, as an illustration). But that is not this case. The circumstances out of which it grew demonstrates that it is not. The need that was to be supplied by the system of contracts here involved was that of an agency and a conduit for the distribution of respondent's periodicals, and those were the relations the contracts expressed. That has been their purpose and intent from the beginning, not as a device or subterfuge, but in entire good faith.

This point is so clear to us that we do not deem it necessary to discuss the question whether, assuming the contract to be a contract of sale, the effect thereof "may be to substantially lessen competition or tend to create a monopoly in any line of commerce", which is essential to the denunciation of such a contract under § 3 of the Clayton Act. An additional reason for refraining from a discussion of that point under this head is that that phase of the matter necessarily enters into the discussion of the charge of an unfair method of competition under the next point.

IV.

Respondent's contracts with its district agents do not constitute an unfair method of competition within Section 5 of the Federal Trade Commission Act.

In *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, this Court said:

> "The words 'unfair method of competition' are not defined by statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade".

This statement is reiterated by quotation in *Federal Trade Commission* v. *Beech-Nut Packing Co.* (42 Sup. Ct. Rep. p. 150) in which case it is said:

> "If the 'Beech-Nut system of merchandizing' is against public policy because of 'its dangerous tendency unduly to hinder competition or to create monopoly', it was within the power of the Commission to make an order forbidding its continuation".

Standard Fashion Co. v. *Magrane Houston Co., supra,* is an illustration of a system of contracts containing a covenant on the part of retail dealers in patterns not to sell or permit to be sold on their premises during the term of the contract any other make of patterns, and not to sell

Standard patterns except at labeled prices, and it was held that it substantially lessened competition and tended to create monopoly, it appearing that "of 52,000 so-called pattern agencies in the entire country the petitioner, or its holding company controlling it and two other pattern companies, approximately controlled two-fifths of such agencies".

In *Chicago Board of Trade* v. *United States,* 246 U. S. 231, at page 238, this Court said:

> "But the legality of an agreement of regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

We take these statements of this Court as our guide.

The respondent's system of distributing its publications has been described. The central feature of it is its organization of boy salesmen, who secure their own customers and make delivery to them, and its district agents, who train and manage that organization and supply the publications to the boys and retail dealers. It is a system that has been built up during a period

of twenty years at great expense and with great success in the expansion of the demand for the publications on the part of the public. It is not claimed on behalf of the Commission that the system of distribution is illegal or against public policy or good morals as a system. Indeed it is conceded (Petitioner's Brief, pages 13 and 54) that approximately 1,088 of the respondent's district agents in this country, though under the contract, are exempt from the operation of the Commission's order and that the respondent is not restrained from employing district agents under such contracts who are not so-called wholesale dealers; which is tantamount to a sanction of the system as such with that single limitation. We have not, therefore, to deal with such situations as were involved in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490; *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, and other similar cases, where illegal price control was the object and purpose of the system, consisting of contracts or practices, and was condemned in its entirety; nor with such a situation as was involved in *Standard Fashion Co.* v. *Magrane Houston Co., supra,* where the object and purpose of the offensive system of contracts with their excluding covenant was to restrict all dealers with whom the Fashion Company dealt and thereby hinder competition, and it could therefore be dealt with by a comprehensive prohibition, pure and simple. The respondent's system of distribution with its restrictive covenant is not questioned as inherently offensive to public policy, "because of its dangerous tendency unduly to hinder competition or create monopoly".

The claim is that the restrictive covenant has that effect and is an unfair method of competition with respect to a limited number of wholesale dealers in newspapers, or in magazines and periodicals, or in both, who were so engaged at the time they entered into

their contracts with the respondent, insofar as competitive publications are involved. The findings are that approximately 447 of such dealers were so engaged at the time they entered into their contracts with the respondent, and that many of them, and many who have become such wholesale dealers since entering into such contracts, have requested respondent's permission to engage in the sale or distribution of publications competing with those of respondent, which permission has been uniformly denied (R, page 31).

The position taken in the petitioner's brief is that the order affects only these 447 dealers (Brief, pages 13, 14, 53, 54). This eliminates the necessity of any attention to the other class mentioned in the finding as "many others who have become such wholesale dealers since entering into such contracts" (I, pages 91, 92). The 447 dealers are described as "wholesale dealers in newspapers or magazines or both". Even if there was any basis in the proofs for the number 447, the inclusion of wholesale dealers in newspapers only was unwarranted under the allegations of the amended complaint (*ante,* pages 2-3). How many of the 447 were wholesale dealers in newspapers only is not stated in the findings, and any conclusions drawn from that number of 447 dealers are, therefore, vitiated. The only time the number 447 appears in the proofs it is given as the number of district agents who were wholesaling newspapers *at the time of the hearing,* not when they were engaged (*ante,* page 35) and as such has no relevancy with respect to this theory of the petitioner. What might be a relevant number with respect to that theory is the number of respondent's district agents who were engaged in wholesaling periodicals or magazines at the time they entered into their contracts with the respondent. That number is 102 and it is not disputed. It follows, therefore, that out of a total of 1,375 district agents at the time of the

hearing only 102 were engaged in wholesaling periodicals or magazines when they were appointed. They are unidentified by name or location. There is nothing in the findings with respect to the extent to which they were so engaged or whether there were other wholesalers of periodicals or magazines in their locality. There is nothing but the conclusion that many of a conglomerate mass of wholesale dealers in newspapers or magazines or both at the time of their appointment as district agents are *now* in most instances the principal and most efficient, and in numerous cases the only, medium for the distribution of such publications in various localities of the United States; and that in enforcing the restrictive covenant as to many of such conglomerate mass and thereby denying them permission to engage in the distribution of certain publications competing with those of the respondent, the respondent has prevented and now prevents *certain of its competitors* from utilizing those established channels. There is nothing in the findings respecting what those certain competing publications are or how many of them there are, or who the certain competitors are or how many of them there are. There is not a finding or even a conclusion confined to the 102 district agents who were wholesaling magazines or periodicals when they were appointed.

It scarcely needs argument to enforce our contention that on this showing no case was made establishing that the restrictive covenant in the contract with these district agents was against public policy because of its "dangerous tendency unduly to hinder competition or create monopoly" and therefore an "unfair method of competition". There is in it no basis for such an effect or for the attribution to the respondent in the appointment of its district agents under the restrictive covenant of an intent or purpose to hinder competition or create a monopoly or for an inference that such a result was contem-

plated. On the contrary it conclusively appears that there was no such purpose. The appointments were made for the legitimate purposes of a system of distribution. Out of 1,700 district agents in 1910 eighty-five per cent. of them were Curtis boys or retail dealers, which quite excludes the idea of a scheme to build up a system of distribution which would throttle competition or be monopolistic in character. At the time of the hearing there were only 102 district agents who were wholesaling magazines or periodicals when they were appointed. There was no restrictive covenant until 1911 when it was forced upon the respondent to protect its boy organization from the encroachments on it of another publisher of magazines and periodicals. The proof shows that the respondent never sought to prevent an agent from continuing after his appointment to wholesale the magazines or periodicals he was wholesaling at the time of his appointment; that it has always been liberal in giving permission to its agents to wholesale the magazines and periodicals of other publishers, whether competitors or not; and that it extended that permission even to the publications of the Pictorial Review Company and the Crowell Publishing Company which it did not withdraw until their offensive raids in 1917 on its boy organization through certain of its district agents. The fact is that the restrictive covenant was only adopted as a measure to meet such emergencies and in some cases to prevent agents from undertaking more business than they could do satisfactorily. The irresistible conclusion from these facts is that the sole purpose and intent of the respondent was an honest and legitimate purpose and intent to establish, through its boy organization and its district agents and its contracts with the latter, an effective system of distribution and an increased circulation of its periodicals. That was the conclusion of Hand, *J.*, with the whole case before him in *Pictorial Review Co.* v. *Curtis Pub. Co., supra,* and very emphatically of the

court below in its opinion, based on an obviously exhaustive and thorough consideration of the case.

The parties injured, according to the findings, by the respondent's denial of permission to sell and distribute certain publications competing with those of the respondent therein set forth are *certain* of its competitors (R, page 31). The only complaining competitors disclosed by the proofs are the Pictorial Review Company and the Crowell Company with their five publications (see R, page 48). But these companies had built up for their periodicals and magazines a very large and increasing circulation through the existing channels of sale and distribution. There was the American News Company with its nation-wide selling and distributing facilities. The completeness of its service is shown by the testimony of Thomas H. Beck, circulation manager of the Crowell Company, and of B. A. Mackinnon, circulation manager of the Pictorial Review. Beck testified as follows:

"Q. Will you now describe how the distribution of magazines is made through the American News Company—how do they operate?

A. We supply our publications to them and they distribute them through their branches and their branches redistribute to retail news dealers. They cover the entire country with that service.

* * * * * *

Q. Have you been able to reach all of the retail dealers through the agency of the American News Company?

A. Yes; we can reach all the retail news dealers through the American News Company" (I, pages 106, 107).

* * * * * *

"Q. Is it not a fact that the American News Company operates throughout the United States and reaches every part of the country?

A. Yes, sir.

Q. Do you know of any place or locality where

a retailer could not get, through the American News Company, the Star edition of the magazine you refer to, and your other magazines?

A. I do not" (I, page 119).

Mackinnon testified as follows:

"Q. Is it not a fact that the American News Company reaches every point in the United States where your magazine could be wanted by the reader?

A. Yes, sir (I, page 268).

* * * * * *

Q. Is it not possible for any retail dealer in any part of the United States to get copies of your magazine through the American News Company, for sale?

A. Yes, sir.

Q. And it has always been so; is not that the fact?

A. As far as I know; yes, sir" (I, page 269).

In referring to the service of the American News Company we merely desire to call attention to the fact that it constitutes an efficient channel of sale and distribution of magazines and periodicals through which all magazine publishers may reach the retail dealers and the public.

There were also as channels of sale and distribution other wholesale periodical and magazine dealers throughout the country unconnected with the respondent, and the vast body of retail periodical and magazine dealers any of whom were available as wholesale dealers and could be utilized as such as the experience of the respondent had proved (II, pages 1331, 1332). This is not a matter of conjecture because the publishers of the Pictorial Review, when the respondent withdrew its permission for its sale by its district agents in 1917, turned to these wholesalers and retailers with great success. There is their own conclusive testimony on that point.

Mackinnon testified that when the respondent refused to permit its agents to handle the Pictorial Review he got other persons to act as wholesale distributors of his magazine (I, pages 185, 267).

On March 8, 1917, he wrote to the respondent's agent, J. C. Ramroth of Troy, New York, and stated, among other things, as follows:

> "Fortunately, however, *there are a lot of good wholesalers in this country who do not handle Curtis publications*, and there are many more who do handle Curtis publications that will not let Mr. Curtis put a limit on the growth of their business" (I, page 399). (Italics ours.)

On March 14th, 1917, he sent out about 600 circulars containing the following statement:

> "When I broke away from the News Company I started out to enlist the wholesalers for Pictorial Review and expected to encounter many difficulties. * * * But, gentlemen, it has been a cinch! Once more we are proving that you can't keep a good magazine down. Everywhere we went Pictorial Review was received with open arms by red-blooded, live-wire wholesalers who realized the tremendous selling power of a magazine with a circulation of 1,400,000 copies monthly. Only one big publisher fought us, and without realizing it, helped us to put it across more quickly than we otherwise expected" (II, page 1286).

On March 15, 1917, he wrote a letter to the respondent's agent, Harry Solomon of Cleveland, Ohio, clearly showing that he found no difficulty in getting wholesalers wherever wanted. In that letter he states:

> "Regarding the Philadelphia situation, I wish to say that we have closed up all the cities in the country wherever there were enough dealers to warrant our appointing a wholesaler. Our organization is complete" (I, page 402).

The same is true of the Crowell Company.

The Vice-President of that Company testified that his Company had no difficulty in obtaining retail dealers to wholesale and distribute its publications (I, pages 115, 116); and another of the representatives of the Company testified that there were only six towns in the entire country in which he had been unable to make similar arrangement for the wholesaling of its publications (I, page 160). When Mr. Beck, the circulation manager of that Company, was asked on behalf of the Commission as to the effect of the respondent's contracts on the circulation of its magazines the following testimony was elicited:

> "Q. Now, knowing the business as you do, Mr. Beck, can you give any view as to the way in which your circulation is hampered, because of your inability to secure the services of these various wholesalers?
>
> A. Why, I would not like to testify that our circulation was hampered on that account, because we believe we have enough ingenuity to get the circulation under any circumstances" (I, page 110).

Instead of the competition of the magazines and periodicals of these two Companies having been stifled or hindered by the operation of the restrictive covenant in the respondent's contract their circulation has increased phenomenally. During the period of ten years prior to May, 1917, when the Pictorial Review was distributed through the American News Company (excepting its distribution by mail) its circulation increased from 150,000 monthly to 1,200,000 monthly in January, 1917 (I, page 254), which was about the date it commenced its efforts to get the services of the respondent's organization. Its average net sale was 981,895 monthly for the year 1914, and 1,217,760 for the year 1916 (I, page 255), an increase of about a quarter of a million on

monthly sales in the last two years it was distributed through the American News Company. During the pendency of this proceeding and while the testimony was being taken herein, its circulation, which was 1,200,000 monthly in January, 1917, increased, by December, 1917, to 1,400,000 monthly (I, page 175), and to 1,500,000 monthly in July, 1918, when the testimony was closed (IV, page 3401).

The Crowell Publishing Company's publications also showed a steady and large increase in their circulations during the four years prior to the commencement of this proceeding (I, pages 112, 113); the "Woman's Home Companion" having increased from 950,000 to 1,900,000 monthly, and the "American Magazine" having doubled its circulation in that period (I, page 112).

Thus the facts concerning the only complaining competitors demonstrate that there were and have been all along ample channels for the distribution of magazines and periodicals and that there was no prevention or lessening of, or interference with, competition by the restrictive covenant in the respondent's contract with its district agents. As the case of unfair method of competition fails as to them on the actual facts established by the proofs there is no basis for it in any theoretical conclusions in respect to the effect of the restrictive covenant on channels of distribution, and no basis for mutilating the distributive system of the respondent, built up and maintained at great expense for the legitimate purpose of securing an efficient and expanding circulation of the respondent's publications on the theory of "its dangerous tendency unduly to hinder competition or to create monopoly." Hence the case of the petitioner fails.

V.

The effect of the order of the Commission.

The order of the Commission is as follows:

> "NOW, THEREFORE, IT IS ORDERED, That the respondent, Curtis Publishing Company, and its officers, directors, agents and employees, cease and desist, while engaged in competition in commerce among the several States and Territories of the United States and the District of Columbia, from entering into any contracts, agreements or understandings with persons, partnerships or corporations already engaged in the sale or distribution of the magazines or newspapers, or both, of other publishers, which provide that such persons, partnerships or corporations shall not act as agents for, or sell, or supply to others at wholesale rates, any periodicals other than those of respondent without the written consent of respondent; and from entering into any contracts, agreements or understandings with persons, partnerships or corporations already engaged in the sale or distribution of the magazines or newspapers, or both, of other publishers, which provide that such persons, partnerships or corporations shall not sell or distribute, or shall not continue to sell or distribute the magazines or newspapers, or both, of other publishers and from enforcing any provision which may be contained in any of respondent's present outstanding contracts with persons, partnerships or corporations now engaged in the sale or distribution of magazines or newspapers, or both, of other publishers which provide that such persons, partnerships or corporations shall not sell or distribute the magazines or newspapers, or both, of other publishers, or shall not sell or distribute the magazines or newspapers, or both, of other publishers without the written consent of respondent."

It will be observed that this order prohibits the respondent (1) from hereafter appointing as an agent,

under its agency contract, any person who may be wholesaling a single magazine or a single newspaper, and (2), from continuing its agency contracts in force with any of its agents who may have wholesaled a single magazine before he was appointed and have continued so to do without objection on the part of the respondent, or who may have taken up the wholesaling of another magazine after his appointment, with the consent of the respondent, or who may have wholesaled a single newspaper before his appointment or taken up the wholesaling of a single newspaper after becoming the respondent's agent.

This obviously disrupts the entire distributive system of the respondent, despite the position taken in the petitioner's brief that the order affects only the district agents who were wholesale dealers when appointed.

This position is set forth at various places in petitioner's brief. As illustrations of this, we call attention to the following:

On page 9 it is said that some of the wholesale dealers in magazines and periodicals were originally Curtis boys who "having proven to be efficient salesmen were given the work of wholesaling the Curtis publications in their city, community or town, and that the Commission's order does not apply to them or affect their relations with the respondent". That is an erroneous view. A Curtis boy when employed as a district agent and entering into the district agency contract with the respondent is no different from any other district agent and the order of the Commission applies to him, if he has undertaken to wholesale a newspaper or a magazine or periodical of another publisher since his appointment, just as it applies to any other district agent affected by it.

On page 13 of petitioner's brief it is stated that the Commission's order does not apply to respondent's contracts with 1,088 of its agents who "had not, prior to entering into such contracts with respondent, been en-

gaged in selling or distributing the newspapers or publications of publishers other than the respondent". The order applies to and affects all of such agents who may have undertaken to wholesale a newspaper or a magazine or periodical after their appointment, even though they had not, prior to their appointment, been engaged in selling or distributing either newspapers or magazines or periodicals. The order prohibits the respondent "from enforcing any provision which may be contained in any of respondent's present outstanding contracts with persons, partnerships or corporations *now engaged* (*i. e.*, at the time of the making of the order) in the sale or distribution of magazines or newspapers or both of other publishers".

The same erroneous view as to the effect of the order with respect to these 1,088 agents of the respondent is expressed at pages 54 and 55 of petitioner's brief, where it is also stated that the court below misconstrued the order in respect to its application to such of the respondent's agents as were not, prior to their appointment, engaged in wholesaling newspapers or the publications of other publishers. The language of the order is too clear to admit of any misconstruction.

At page 29 of petitioner's brief the following statement appears:

> "Furthermore, it should be pointed out here that the Commission's order applied only to those dealers who, *previous to contracting with the Curtis Company,* had already become established as wholesale dealers. So far as the Commission's order is concerned, therefore, the nature of the business of dealers under contract with the Curtis Company, *other than those already established as wholesalers,* need not be considered."

As previously pointed out, the order, in explicit terms, applies to and affects not only every district agent who

"previous to contracting with the Curtis Company had already became established as a wholesale dealer" but every agent who has undertaken, since contracting with the respondent, to wholesale a newspaper or a magazine or periodical, and who was doing so at the time the order was made.

At page 53 of petitioner's brief, the following statement appears.

> "It should also be borne in mind that the Commission's order only prohibits respondent from entering into or enforcing contracts with wholesalers, dealers established as such prior to sale of respondent's publications".

This is subject to the same conclusion.

We have dwelt on these matters for the reason that in the enforcement of the order, it is its terms which will govern and not the construction thereof advanced in the Petitioners' brief.

VI.

It is respectfully submitted that the decree and judgment of the Court below, setting aside the order of the Federal Trade Commission, be affirmed.

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